

January 16, 2009

DA 09-86

Mr. Scott Barash
Acting Chief Executive Officer
Universal Service Administrative Company
2000 L Street, N.W.
Suite 200
Washington, DC 20036

Re: Schools and Libraries Program, WC Docket No. 02-6
"Table C" recovery issues

Dear Mr. Barash:

This letter responds to the outstanding policy issues regarding recovery of funds in the schools and libraries universal service program, also known as the E-rate program, on which USAC has sought formal guidance. On March 8, 2006, USAC submitted a memorandum proposing action regarding schools and libraries commitment adjustments and funds recoveries. In that memorandum, USAC submitted lists of recovery situations in a table format: Tables A, B, and C.¹ Table C contained scenarios that were not specifically addressed in the *Schools and Libraries Fifth Report and Order*, and USAC had proposed to seek recovery for the violations listed in Table C.

Those Table C scenarios are outlined in the attached chart. The chart provides our guidance as to when recovery should occur. Generally, we agree with USAC's recommendations to process recoveries for the scenarios listed. However, in certain instances we believe that recovery might not be appropriate for particular factual situations, as explained in detail below and as noted on the chart.

Children's Internet Protection Act (CIPA) Violations: USAC recommended complete recovery in every instance in which the applicant did not comply with all CIPA requirements, which require a school or library to certify that it is enforcing a policy of Internet safety that includes measures to block or filter Internet access for minors and adults to certain visual depictions.² We note, however, that, in certain instances, although the applicant may not have been in technical compliance, there was substantial compliance with the spirit of the CIPA requirements. For example, an audit found that Little Rock School District (Little Rock) was not in compliance with the CIPA requirement to have in place an

¹ Table A contained scenarios that were specifically addressed in the *Schools and Libraries Fifth Report and Order* and in which there was a specific reference in the *Schools and Libraries Fourth Report and Order* as to the party from whom recovery should be directed. Table B contained scenarios that were specifically addressed in the *Schools and Libraries Fifth Report and Order*, but did not have a specific reference in the *Schools and Libraries Fourth Report and Order* as to the party from whom recovery should be directed. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, (2004) (*Schools and Libraries Fifth Report and Order*); *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45, 97-21, 02-6, Order on Reconsideration and Fourth Report and Order, 19 FCC Rcd 15252 (2004) (*Schools and Libraries Fourth Report and Order*).

² See 47 C.F.R. §54.520.

Internet safety policy that addressed measures designed to restrict minors' access to harmful materials. Although Little Rock's Internet safety policy did not address this point, Little Rock did have in place an Internet filter that restricted minors' access to harmful materials. In this case, recovery is not warranted.

Services Delivered to an Entity Not Listed on the FCC Form 471: USAC recommended complete recovery in every instance in which services were delivered to an entity that was not listed in the applicant's FCC Form 471. Pursuant to the Commission's direction in its *Bishop Perry Order*, however, USAC has allowed applicants to modify their FCC Forms 471 for clerical and ministerial errors.³ Accordingly, an applicant first must be given an opportunity to show that the omission of such entity from the FCC Form 471 was a ministerial or clerical error. If such entity would otherwise be eligible, then recovery is not warranted.

No Signed Contract (2004 and Beyond); No Legally Binding Agreement (2003 and Before): Starting in 2004, USAC denied the validity of contracts unless they were signed and dated by both parties. USAC also began to distinguish between contracts and legally binding agreements. USAC based its actions on language in the *Schools and Libraries Fifth Report and Order*, which states that, for recordkeeping purposes, applicants and service providers should keep "executed contracts, signed and dated by both parties."⁴ Consistent with the Commission's direction, contract guidance information posted on USAC's website no longer requires a contract to be signed and dated by both parties.⁵ Thus, USAC should not recover funding if there was a binding agreement that was legal under state law.

Equipment Not Utilized: USAC recommended recovery in every instance in which equipment was not utilized: for example, the equipment was installed but not connected to any computers, or some equipment was still in its original packaging and had not been installed. There could be situations that would justify a decision to not recover funds. For example, in one of the audits, Brownsville Independent School District delayed installation of all equipment due to human resource limitations, but anticipated that very shortly all of the equipment would be installed. In this instance, if the equipment was subsequently installed, recovery would not be warranted.

³ See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 21 FCC Rcd 5316 (2006) (*Bishop Perry Order*).

⁴ *Schools and Libraries Fifth Report and Order*, 19 FCC Rcd at 15824, para. 48.

⁵ See USAC website, Contract Guidance, <http://www.usac.org/sl/applicants/step04/contract-guidance.aspx> (retrieved Jan. 16, 2009); *Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 22 FCC Rcd 6019 (2007) (the Commission granted waivers of rule section 54.504(c) where the petitioners had legally binding agreements in place for the relevant funding years, but missed the deadline for providing evidence of a signed contract).

This letter addresses all of the outstanding issues on which USAC has sought formal guidance from the Commission. Please let me know if you have any questions.

Sincerely,

Dana R. Shaffer
Chief
Wireline Competition Bureau

Table C Policy Issues

Issue	Relevant Rule	Guidance
1. Technology Plan Deficiency – applicant’s technology plan did not have all five criteria.	54.508(a), stating the required elements of a technology plan.	Recover.
2. CIPA certification violations – applicant did not comply with all CIPA requirements.	54.520(c)(1), stating the certifications required by 47 CFR § 254(h) and (l).	Recover generally; however, certain situations may not warrant recovery. <i>See</i> letter.
3. Services delivered to an entity that was not approved to receive the service on FCC Form 471 for the Funding Request Number (FRN).	4 th R & O, 19 FCC Rcd 15252, ¶15, stating that the service provider is likely to be the responsible party if it delivers services that were not approved for funding under the Form 471.	USAC should determine if the entity should have been listed on the FCC Form 471 and, if so, allow the applicant to amend the FCC Form 471. <i>See</i> letter. Otherwise recover.
4. Service provided or equipment installed at an ineligible entity or used for an ineligible purpose.	54.501(b), (c), (d), stating the requirements for eligible entities. 54.505, stating how to determine the discount for an entity. 54.507(g) stating the rules of priority. 4 th R & O, 19 FCC Rcd 15252, ¶15, stating that the service provider is likely to be the responsible party if it delivers services that were not approved for funding under the Form 471.	Recover.
5. Equipment transferred prior to 3 years after purchase or prior to closure of entity.	54.513(c), prohibiting the transfer of equipment for 3 years, with certain exceptions.	Recover.
6. No signed contract (2004 and beyond). No legally binding agreement (2003 and before).	5 th R & O, 19 FCC Rcd 15808, ¶ 48, stating that for recordkeeping purposes, applicants and service providers should keep “executed contracts, signed and dated by both parties.”	Do not recover if there was a binding agreement that was legal under state law. <i>See</i> letter.

Issue	Relevant Rule	Guidance
7. Non-telecommunications carrier provided telecommunications services.	54.501(a), stating that only telecom carriers may receive E-rate support for providing telecom services.	Recover.
8. Failure to bill for the non-discounted portion.	54.523, requiring applicants to pay their share.	Recover.
9. Funding disbursed priority two services below the funding threshold. This occurs when USAC funds priority one services that are actually priority two services because the entity has improperly categorized them and the entity's discount level is below the fundable priority two threshold for that funding year.	54.507(g), stating the rules of priority.	Recover.
10. Free services not deducted from the total pre-discounted cost of services and thus used to provide ineligible items or to provide a greater discount rate than that to which the applicant is entitled.	54.523, requiring applicants to pay their share, prohibiting the provision of rebates, defining rebates to include free services or products.	Recover.
11. Equipment not utilized (equipment has been installed but no computers are connected, or that some equipment is still in its original packaging and has not been installed).	54.507(d), setting forth the implementation deadline for non-recurring services. 54.504(b), 54.504(b)(2)(ii), requiring applicants to use services and equipment only for educational purposes.	Recovery depends on the individual situation.

Issue	Relevant Rule	Guidance
12. Could not locate equipment.	54.504(b), 54.504(b)(2)(ii), requiring applicants to use services and equipment only for educational purposes. 54.516(a), requiring applicants to maintain asset and inventory records of equipment purchased as components of supported internal connections services sufficient to verify the actual location of such equipment for 5 years.	Recover.